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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

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NO. 76-1589

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JERRY DAWKINS,  
Petitioner,

versus

NABISCO, INC., and BAKERY AND CONFECTIONARY  
UNION LOCAL NO. 42,  
Respondents.

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BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

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June 1977

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OPINIONS BELOW

This case was decided by the United States District Court for the Northern District of Georgia in 1973. The district court proceedings are reported at 6 CCH Employment Practices Decisions Paragraph 8754 (procedural ruling on whether the case should proceed as a class action) and 7 CCH Employment Practices Decisions Paragraph 9348 (the ruling on the merits). The district court was affirmed by the United States Court of Appeals for the Fifth Circuit in June of 1975 which is reported at 515 F.2d 1181. In 1976,

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Petitioner filed a motion to reopen the case in the United States District Court for the Northern District of Georgia which was denied. A copy of the decision of the district court is reproduced in Appendix A to this opposition. The United States Court of Appeals for the Fifth Circuit affirmed (which decision is reported at 13 CCH Employment Practices Decisions Paragraph 7153).

JURISDICTION

Petitioner does not state a proper jurisdictional base for this Court to invoke jurisdiction in his Writ.

COUNTER STATEMENT OF  
STATUTE INVOLVED

This case involves only the application of Federal Rule of Civil Procedure 60(b). The text of the rule is set forth in full in Appendix B to this brief.

COUNTER STATEMENT OF  
QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals erred in affirming the judgment of the United States District Court for the Northern District of Georgia refusing to reopen a final judgment pursuant to Federal Rule of Civil Procedure 60(b) rendered on October 26, 1973, when the motion to reopen was filed on June 11, 1976, over two and one-half years after entry of final judgment and did not state proper grounds to reopen.

COUNTER STATEMENT  
OF THE CASE

The Petitioner instituted a class action alleging racial discrimination in employment against the Respondents in April of 1972 in the United States District Court for the Northern District of Georgia. The court did not allow the case to proceed as a class action and rendered judgment on the merits against the Petitioner. In the judgment rendered on October 26, 1973, the district court found that the seniority system at the Nabisco plant where Petitioner was employed was nondiscriminatory, that promotions, layoffs and shift assignments were made on a nondiscriminatory basis, and that plaintiff Dawkins had not been discriminated against on account of his race. 1/ This judgment was appealed to the Fifth Circuit Court of Appeals where it was affirmed by per curiam opinion on June 30, 1975. No petition for a rehearing was filed by Petitioner nor was a writ taken to this Court. The judgment became final.

On June 11, 1976, Petitioner filed a motion to reopen the judgment in the district court. The district court refused to reopen the case on the grounds that the motion to reopen was not timely, that

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1/ There is no basis in the record for the statements made by Petitioner in his brief claiming discrimination due to his "recent further investigations."

Petitioner had failed to allege any mistake, newly discovered evidence or fraud, and had failed to state a reason sufficient to justify relief under 60(b)(6). Petitioner appealed this judgment to the Fifth Circuit Court of Appeals which affirmed the judgment stating:

"Trial of the first action resulted in a judgment against Dawkins in 1973, and this court affirmed without published opinion. See 515 F.2d 1181, 5 Cir. In June 1976 Dawkins moved to reopen the judgment. The district court denied the motion, and Dawkins appeals. We find no basis for reopening the judgment and therefore affirm. See Fed. R. Civ. P.60(b)."

ARGUMENT

There is no special or important reason to grant a writ in this case. Petitioner seeks to have this Court review a judgment of the Fifth Circuit Court of Appeals affirming the application by a lower court of Rule 60(b) of the Federal Rules of Civil Procedure. The ruling of the Fifth Circuit is not in conflict with that of any other circuit, nor is it in conflict with any decision of this Court. The proceedings below were proper and did not depart from the accepted and usual course of judicial proceedings and no basis is present for a review of the decision of a United States Court of Appeals under Rule 19 of this Court. Rice v. Sioux City Cemetery, 349 U.S. 70, 73-74 (1955).



Respondent respectfully prays that  
the Writ be denied.

Respectfully submitted,

ELARBEE, CLARK & PAUL

By: Fred W. Elarbee, Jr.

By: Charles K. Howard, Jr.  
800 Peachtree-Cain Tower  
229 Peachtree Street, N.E.  
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Petitioner, Jerry Dawkins, 151 Dahlia Avenue, N. W., Atlanta, Georgia 30314 and on Patrick M. Scanlon, 600 Rhodes Haverly Building, Atlanta, Georgia 30303, Attorney for Bakery and Confectionary Workers Union No. 42, by placing copies thereof in the United States Mails in a properly addressed envelope with adequate postage thereon.

This \_\_\_\_ day of June, 1977.

Charles K. Howard, Jr.

A-1

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

JERRY DAWKINS

v.

C76-1165A

NABISCO, INC., and  
BAKERY AND CONFECTIONARY  
UNION LOCAL NO. 42

ORDER

This is a civil rights action for monetary damages filed by Jerry Dawkins against Nabisco, Inc. (Nabisco), alleging harassment by Nabisco employees following plaintiff's filing a complaint with the Equal Employment Opportunity Commission (EEOC) in July 1971, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII). Plaintiff also alleges a breach of the duty of fair representation by defendant Local No. 42, Bakery and Confectionary Workers International Union of America (the Union). Simultaneously plaintiff has pending a motion to reopen the case of Dawkins v. Nabisco, Inc., Civil Action No. 16431, under Fed. R. Civ. P. 60(b). That case was litigated over a one and one-half year period in this Court, with the action being finally dismissed in October 1973.

These cases are presently before the Court on the following motions: (1) plaintiff's motion to reopen Civil Action

APPENDIX A

No. 16431; (2) the defendant Union's motion to consolidate the separate pending actions, Civil Nos. 16431 and C76-1165A; and (3) on the defendants Nabisco and Union's motions to dismiss under Fed. R. Civ. P. 12(b)(6).

Inasmuch as the motion to consolidate is unopposed, such motion is hereby ORDERED GRANTED. (See Local Rule 91.2.

The plaintiff's allegations in his complaints are: (1) defendant Nabisco has violated Title VII by harassing plaintiff in retaliation for the filing of a lawsuit; (2) plaintiff is suffering an "anxiety neurosis" as a result of having been docked on the payroll by defendant; (3) the defendant Union has failed to represent the plaintiff fairly and has thus violated 29 U.S.C. §151 et seq; (4) defendant Nabisco discriminated against plaintiff by failing to hire him in 1956, 1959, and 1960, and is therefore liable to plaintiff for back pay.

The defendants contend that the substantive legal issues at bar have previously been litigated by the parties and that the doctrine of res judicata thus bars any further litigation. Defendants also contend that Fed. R. Civ. P. 60(b) is inapplicable in the circumstances presented.

#### Res Judicata

The doctrine of res judicata applies to bar an action where: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) there has been

a final judgment on the merits; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both suits. If these elements are established, litigation is barred as to any issue which was or should have been presented in the prior case. Stevenson v. International Paper Co., 510 F.2d 103, 108-09 (5th Cir. 1975). Inasmuch as a final judgment in Civil Action No. 16431 was rendered by this Court and affirmed by the Fifth Circuit Court of Appeals, the only substantial question is whether or not the same cause of action is involved in the two cases.

The issue of alleged harassment of plaintiff by Nabisco was resolved against plaintiff in the prior suit, as was the question of Nabisco's failure to hire plaintiff in 1956, 1959 and 1960 and to promote him after he was hired. In fact, the Court found in Civil Action No. 16431 that plaintiff "had full opportunity to bid, promote and transfer to the highest paying jobs in the company's plant."

The plaintiff's allegation that he has developed an "anxiety neurosis" as a result of harassment by the defendant does not state a cause of action where the underlying issue of the harassment has been litigated.

Finally, the issue of the Union's breach of its duty to afford the plaintiff fair representation was presented and decided adversely to plaintiff in Civil Action No. 16431. The doctrine of res judicata thus applies to bar relitigation of any of plaintiff's allegations.

Motion to Reopen under Rule 60(b)

Rule 60(b) provides that a judge may relieve a party from final judgment where the party shows: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been previously discovered; (3) fraud; (4) the judgment is void; (5) the judgment is satisfied; or (6) any other reason justifying relief from the operation of the judgment. The motion must be made within one year of final judgment for causes (1), (2), and (3), and within a reasonable time for cause (6). Final judgment was entered in this case on October 26, 1973. Plaintiff filed his motion to reopen on June 11, 1976, more than two and one-half years later. An intervening appeal does not enlarge the time for filing of the motion. Transit Casualty v. Security Trust, 441 F.2d 788, 791 (5th Cir. 1971). Plaintiff has not alleged any mistake, newly discovered evidence, or fraud. The motion based on Fed. R. Civ. P. 60(b)(1), (2), or (3) must therefore fail.

To succeed under Rule 60(b)(6), plaintiff must prove "another reason justifying relief." The rule has been used only under exceptional circumstances, Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir. 1969); it has not been viewed as a panacea for unhappy litigants. Plaintiff claims that the recent Supreme Court decision in Franks v. Bowman, 44 U.L.L.W. 4356 (March 26, 1976) holding that seniority relief must be given to blacks denied employment because of their race after the effective date of Title VII is controlling and

mandates an award of back payment to plaintiff. This argument has no merit because the Court found in Civil Action No. 16431 that Dawkins had not been discriminated against by Nabisco. Plaintiff alleges no other facts justifying relief under Rule 60(b)(6).

The Court recognizes that the plaintiff is proceeding pro se and has therefore construed the plaintiff's complaint and motion liberally. However, inasmuch as the issues raised by plaintiff have all been completely litigated against the same parties previously, the plaintiff's motion to reopen is hereby ORDERED DENIED and defendants' motions to dismiss are hereby ORDERED GRANTED.

SO ORDERED, this 9th day of September, 1976.

s/Charles A. Moye, Jr.  
UNITED STATES DISTRICT JUDGE



## APPENDIX B

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## APPENDIX A

### Rule 60(b) Federal Rules of Civil Procedure, Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title

28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram, nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.